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IN THE

Supreme Court of the United States

HOWARD MORGAN,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the Illinois Court of Appeals, which relies on alternative theories of guilt and speculates on the rationale of the jury's failure to reach a verdict on some counts as compared to the jury verdicts of not guilty, is in conflict with this Court's recent decision in *Yeager v. United States*, 129 S. Ct. 2360 (2009) and in violation of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution?

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IN THE

Supreme Court of the United States

No. 09-____

HOWARD MORGAN,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Howard Morgan, respectfully prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois.

OPINION BELOW

The opinion of the Illinois Appellate Court is unpublished and attached to this petition as Appendix A. The unpublished order denying Petitioner's Motion for Rehearing is attached as Appendix C and the unpublished order of the Illinois Supreme Court denying the Petition for Leave to Appeal is attached as Appendix B. The trial court's denial of the Petitioner's Motion to Dismiss the indictment on double jeopardy grounds is attached as Appendix D.

JURISDICTION

Petitioner was charged with four counts of attempt first-degree murder of a police officer, three counts of aggravated battery with a firearm, and one count of aggravated discharge of a firearm. On May 11, 2007, a jury found Petitioner not guilty of two counts of aggravated battery with a firearm and not guilty of aggravated discharge of a firearm. The trial court declared a mistrial on the five remaining charges after the jury was unable to reach a verdict on those counts and set the case for retrial.

Petitioner filed a Motion to Dismiss arguing that retrial on the five remaining counts would violate the Petitioner's constitutional right against double jeopardy. On October 19, 2007, the Circuit Court of Cook County Illinois denied Petitioner's Motion to Dismiss (Appendix D). On November 13, 2007, Petitioner filed an interlocutory appeal to the Appellate Court of Illinois. On August 28, 2009, the Appellate Court affirmed the decision of the Circuit Court (Appendix A). On December 2, 2009, the Appellate Court denied the Petition for Rehearing (Appendix C). Petitioner filed for leave to appeal to the Supreme Court of Illinois. On March 24, 2010, the Supreme Court of Illinois denied the Petition for Leave to Appeal (Appendix B).

This petition is being filed within 90 days of the denial of the Petition for Leave to Appeal. The jurisdiction of this Court to review the judgment of the Appellate Court of Illinois is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States, Section One, provides in pertinent part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ."

ILLINOIS CONSTITUTIONAL PROVISION INVOLVED

No person shall be compelled in a criminal case to give evidence against himself nor be twice put in jeopardy for the same offense. Ill. Const. Art. 1 § 10 (1970).

ILLINOIS STATUTORY PROVISIONS INVOLVED

720 Ill. Comp. Stat. 5/12-4.2 (LexisNexis 2010):

Aggravated Battery with a Firearm

(a) A person commits aggravated battery with a firearm when he, in committing a battery, knowingly or intentionally by means of the discharging of a firearm

(1) causes any injury to another person, or

(2) causes any injury to a person he knows to be a peace officer . . . while the officer . . . is engaged in the execution of any of his official duties . . .

720 Ill. Comp.Stat. 5/8-4 (2010):

Attempt

(a) Elements of the offense. A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense.

720 Ill. Comp. Stat. 5/9-1 (2010):

First Degree Murder

(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

(1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another . . .

720 Ill. Comp. Stat. 5/24-1.2 (2010):

Aggravated Discharge of a Firearm

(a) A person commits aggravated discharge of a firearm when he or she knowingly or intentionally . . .

(3) Discharges a firearm in the direction of a person he or she knows to be a peace officer . . . while the officer . . . is engaged in the execution of any of his or her official duties . . .

720 Ill. Comp. Stat. 5/3-4 (2010):

Effect of Former Prosecution

(a) A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if that former prosecution:

(1) resulted in either a conviction or an acquittal or in a determination that the evidence was insufficient to warrant a conviction

(2) was terminated by a final order or judgment, even if entered before trial, that required a determination inconsistent with any fact or legal proposition necessary to a conviction in the subsequent prosecution;

725 Ill. Comp. Stat. 5/114-1 (2010):

Motion to Dismiss Charge

(a) Upon the written motion of the defendant made prior to trial before or after a plea has been entered the court may dismiss the indictment, information or complaint upon any of the following grounds . . .

(2) the prosecution of the offense is barred by Sections 3-3 through 3-8 of the Criminal Code of 1961, as heretofore and hereafter amended (720 ILCS 5/3-3 through 720 ILCS 5/3-8).

STATEMENT OF THE CASE

In the early morning hours of February 21, 2005, Howard Morgan, a 54 year old former Chicago police officer, then employed as a special agent for Burling-

ton Northern Santa Fe Railroad, was on his way home when his van was stopped by Chicago police officers.[1] What occurred after the officers approached was disputed at trial and is at the heart of this case, but Howard Morgan suffered at least 25 gunshot wounds and three police officers were also wounded. Subsequently, Morgan was arrested and charged in an eight count indictment with four counts of attempt first-degree murder, three counts of aggravated battery with a firearm and one count of aggravated discharge of a firearm. Three of the attempt murder counts and the three aggravated battery with a firearm counts were based on three officers (Wrigley, Olsen, and White) allegedly being shot by Morgan. The fourth attempt murder count and the aggravated discharge count were based on a fourth officer (Finley) being present at the scene and Morgan allegedly firing in the officer's direction.

All four officers testified at trial. Finley testified that he and his partner John Wrigley stopped a van they observed going the wrong way on a one-way street. Finley approached the van with his weapon drawn. The van's driver, Howard Morgan, appeared agitated. Officer Finley testified that he and Mr. Morgan began to fight after he attempted to perform a protective pat down. Then, according to Finley, Morgan pulled a gun from his waistband and began firing at the officers.

Officer Wrigley testified that he was Finley's partner on the night of the incident and observed Finley and Morgan struggle. After two more officers arrived on the scene, the officers tried to subdue

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[1] The facts here are a brief summary of those articulated by the Illinois Appellate Court at Appendix A.

Morgan. Wrigley claimed that Morgan fired at the officers, who returned fire. He also testified that Morgan pointed a weapon at him and fired. Officer Wrigley got shot but continued to fire at Mr. Morgan.

Officer Nick Olsen testified that he and his partner Eric White were in the area when the incident occurred. He tried to assist Officer Finley after Mr. Morgan began to resist. Olsen claimed he saw Morgan with a gun in his hand. After getting shot, Olsen took cover. He heard more shots fired. Officer White testified that he tried to assist his fellow officers during the struggle with Mr. Morgan. He testified that he saw Morgan point his gun at Wrigley. Officer White was shot, and he fired at Mr. Morgan. According to Olsen, the gun battle continued with the officers and Morgan firing at each other.

Mr. Morgan's testimony contradicted the officers' testimony. He testified that he had served as a Chicago police officer, but worked as a railroad police officer on the date of the incident. He routinely carried a firearm when off-duty. On the date of the incident, Morgan was returning home. Within a block from his destination, he saw police car lights activated, and stopped his van. Mr. Morgan observed two officers approaching his van with their guns drawn and pointed at him. He had a firearm in his waistband. The officers snatched Morgan out of his vehicle and forced him to the ground. Mr. Morgan felt the officers pull his weapon from his waistband. Then the officers shot him. Morgan lost consciousness and woke up in the hospital. Morgan testified that he never had his hand on nor fired his weapon. He had no prior record and did not use narcotics or alcohol.

On May 11, 2007 the jury returned three not guilty verdicts, but they failed to reach verdicts on the

remaining counts. The court declared a mistrial on these counts over defense's objection. The results were as follows:

> As to Officer Finley, the jury found the Petitioner not guilty of aggravated discharge of a firearm and was hung on attempt murder.
>
> As to Officer Wrigley, the jury was hung both on aggravated battery with a firearm and on attempt murder.
>
> As to Officer Olsen, the jury found the Petitioner not guilty of aggravated battery with a firearm and was hung on attempt murder.
>
> As to Officer White, the jury found the Petitioner not guilty of aggravated battery with a firearm and was hung on attempt murder.

The Petitioner moved to dismiss the remaining counts on state and federal double jeopardy grounds. Specifically, Mr. Morgan argued that the jury had necessarily decided that he did not fire a gun during the incident with the four officers. Therefore, under the Supreme Court's decision in *Ashe v. Swenson*, 397 U.S. 436 (1970), the State is prohibited from relitigating that issue. The court denied this motion and Petitioner filed a timely interlocutory appeal to the appellate court.

Before the court decided Petitioner's appeal, this Court decided *Yeager v. United States*, 129 S. Ct. 2360 (2009), which dealt directly with the question presented in Petitioner's appeal. Despite *Yeager*, the Illinois Appellate Court affirmed the circuit court's decision denying Petitioner's motion to dismiss based on double jeopardy grounds, concluding that "a rational juror could have grounded its verdict on an

issue other than whether Defendant discharged a firearm . . ." *People v. Morgan*, Appendix A at 33. In reaching its conclusion the court dissected the charges into four discreet parts tracking the two counts associated with each officer.

Petitioner filed a Petition for Rehearing which the appellate court denied on December 2, 2009. Petitioner then filed a petition for leave to appeal in the Illinois Supreme Court. On March 24, 2010, the Illinois Supreme Court denied the petition. Petitioner now seeks a writ of *certiorari* from this Court on the question of whether the Illinois Appellate Court's articulation of issue preclusion analysis is in conflict with *Ashe* and *Yeager*.

REASONS FOR GRANTING

The Illinois Appellate Court's decision does what *Ashe* and *Yeager* say should not be done. "[T]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe*, 397 U.S. at 444. Moreover, the appellate court did not address the question of whether it is appropriate to treat the attempt murder counts as the same offense as the aggravated battery and aggravated discharge of a firearm counts. Finally, the appellate court's rationale is in contravention of the preclusive effect of the acquittals as announced by *Yeager*.

The acquittals on the aggravated battery and aggravated discharge counts necessarily decided the attempt murder charges. The contested issue in the present case is whether Mr. Morgan fired a gun at the officers and thereby wounded three of them. The jury's acquittals determined "an issue of ultimate

fact," *Yeager*, 129 S. Ct. at 2367 (citing *Ashe*, 397 U.S. at 443), *i.e.* that Mr. Morgan did not fire a gun at or wound the officers. The issue, therefore, cannot be relitigated. *Ashe*, 397 U.S. at 443. The jury could not have rationally based its verdict on any issues other than that which the Petitioner seeks to preclude. The appellate court's analysis of the jury verdicts conflicts with the requirements of *Yeager*. In looking at all of the elements in each category of charged offenses, the logical conclusion is that Mr. Morgan did not fire at or wound the officers. The jury was instructed that to sustain the charge of attempt first degree murder of a peace officer, the State must prove that 1) the defendant performed an act that constituted a substantial step towards the killing of (each individual officer named); 2) the defendant did so with the intent to kill that individual, 3) the individual the defendant intended to kill was a peace officer, 4) the defendant did so at a time when that peace officer was in the course of performing his official duties, and 5) the defendant knew or should have known that the individual was a peace officer. Elements three, four, and five, which the State would have to prove, were not contested. All of the testimony indicated that the officers stopped Morgan by activating their police lights and two uniformed officers approached his van, at least one of whom had his weapon drawn. The officers testified that they stopped him for a traffic violation.

The remaining two elements—that defendant performed an act that constituted a substantial step towards the killing of the officers, and that he did so with the intent to kill—are the same offense as the two elements in the aggravated battery counts. They are also the same as two of the three elements in the aggravated discharge of a firearm count. Again, the

third element of the discharge count, that the defendant knew that the officer was engaged in the execution of his official duties, was not contested.

The acquittal of petitioner for aggravated battery means that the jury decided that petitioner did not intentionally or knowingly cause injury to the officer and/or that he did not discharge a firearm. Those jury findings, taken together or separately, can only be interpreted to mean that the petitioner did not take a substantial step towards killing the officers thus making intent irrelevant. The critical elements at the core of the attempt murder charges were decided by the jury in favor of petitioner.

Similarly as to the aggravated discharge count, by acquitting petitioner of the offense of aggravated discharge of a firearm, the jury must have found that either he did not knowingly discharge a firearm or did not fire it in the direction of the officer. Either way the finding precludes the State from asserting that Mr. Morgan took a substantial step towards killing. The only action alleged—firing in the officer's direction—is foreclosed by the jury acquittal on the aggravated discharge count.

The shooting of or at the officers were the only critical issues of ultimate fact before the jury. "Thus, if there was a critical issue of ultimate fact in all of the charges against petitioner [as the discharge of a firearm in the instant case], a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element." *Yeager*, 129 S. Ct. at 2368.

This issue (the discharge of a firearm) was in all of the charges against Mr. Morgan. The jury necessarily decided this issue in reaching the acquittals for

aggravated battery and aggravated discharge. The Double Jeopardy Clauses of the U.S. and Illinois Constitutions preclude the State from relitigating this issue and protect Mr. Morgan from further prosecution and re-trial.

Through the decisions handed down in *Ashe*, 397 U.S. at 443, and *Yeager* , 129 S. Ct. at 2367, the U.S. Supreme Court has decided that in cases involving issue preclusion, the analysis of the court should focus on the common threads between the acquitted counts and the remaining counts. The Illinois Appellate Court, however, disregards the holdings of *Ashe* and *Yeager* ignoring the common factor between the charges.

In *Ashe*, the Supreme Court held that in criminal cases, collateral estoppel requires a review of the totality of the circumstances. The issue is whether a rational trier of fact could have made its decision on grounds other than those sought to be litigated in the subsequent proceeding. 397 U.S. at 444.

The defendant in *Ashe* was charged with an armed robbery of a poker game. The defendant was initially charged as to one of the six victims, for which he was acquitted after a jury trial. He was then charged with the same count as to another one of the six victims at the poker game.

The U.S. Supreme Court held that the second prosecution was barred based on the doctrine of collateral estoppel because the first verdict necessarily meant that the jury found that the defendant was not present at the robbery. A rational jury could not have found that an armed robbery had not occurred or that the victim at trial had not been a victim of the robbery and for that reason, the only rationally

conceivable issue in dispute was whether the defendant was one of the robbers. As such, the jury must have answered that question in the negative.

Much like the issue in *Ashe*, the critical issue in Morgan's case was whether Morgan was a shooter. The jury's finding of not guilty as to the aggravated battery with a firearm charges pertaining to Officers White and Olsen, and the finding of not guilty as to the aggravated discharge of a firearm pertaining to Officer Finley can rationally mean only one thing: the jury concluded that Mr. Morgan did not discharge a firearm. The discharge of a firearm was the common factor of all eight counts.

The Court in *Ashe* held that a hypertechnical review is not warranted; rather, the reviewing court "must look at the record rationally and realistically." *Ashe*, 397 U.S. at 444. The Illinois Appellate Court, however, in conflict with *Ashe*, conducted its own hypertechnical review when it considered factors irrelevant under *Yeager*. The court focused on what might have motivated the jury in reaching its verdict. For example, the court speculated that the jury might have found a lack of physical evidence connecting Petitioner's firearm to Olson and White's gunshot wounds. According to the court's reasoning this "lack of physical evidence connecting defendant's gun to Officer Olsen and Officer White's injuries provided an alternative basis upon which the jury could have acquitted defendant of the aggravated battery charges against these officers." Appendix A at 35. The court then noted that, by comparison, there was more direct evidence linking the weapon to Wrigley's injury. In this analysis the court implicitly takes into account the effect of the hung counts. Additionally in reaching its conclusion the court dissected the

charges into four discreet parts tracking the two counts associated with each officer. The court makes no effort to determine what, if any, preclusive effect the acquittal regarding one officer might have on future prosecutions. The appellate decision undermines the holdings of *Ashe* and *Yeager* when it reasons that since the jury hung on both counts involving Officer Wrigley, no factual finding could be made as to Officer Wrigley, *i.e.* nothing was necessarily decided about that particular officer. The court's analysis creates an artificial partition of the events of February 21, 2005. By focusing on individual officers, rather than the entirety of the incident, the court disregarded the Supreme Court's affirmative holding that a prior acquittal was not merely a function of the strength of the evidence, a temptation the Court was faced with in *Ashe* and chose to reject. *Ashe*, 397 U.S. at 444.

The Illinois Appellate court's disregard of the limits on the permissible scope of inquiry imposed by *Ashe* is most apparent in its treatment of the aggravated discharge acquittal pertaining to Officer Finley. The court considered the elements of that offense and speculated that the jury may have found that while Morgan did in fact discharge his weapon, he did not do so in Officer Finley's direction. However, all of the officers testified that Morgan did shoot at Finley. The "in the direction of" element was never at issue in trial. The only manner in which this point was contested or "in controversy" was that the defense at all points maintained that Morgan did not fire his weapon at all. The appellate court's reasoning has the jury believing the officers' version of events in all respects except for this small, uncontroverted piece concerning the direction of the bullets.

While it is true the jury could have selectively disbelieved all of the officers insofar as they testified that Morgan did shoot in Finley's direction, just as they theoretically could have believed that Finley was not acting as a peace officer at the time, this is the sort of speculation condemned by *Ashe*. It ignores the nature of the evidence presented at trial and falls entirely outside of the theories of the case developed by the parties. *Ashe* is very clear in its instructions. A reviewing judge may consider only what a *rational* jury could have decided given the case as presented to them at trial. In this case, *as developed at trial*, the jury had to choose between two diametrically opposed, irreconcilable versions of events. The acquittals are the jury's response to this choice.

The approach taken by the appellate court threatens to undermine the availability of collateral estoppel under *Ashe* in criminal cases, and all cases in which a fact-finder reaches a general verdict without spelling out its reasoning. The Court in *Ashe* expressly stated this concern. Because most crimes involve multiple elements, a reviewing judge could always say that an acquittal was based on findings regarding element A as opposed to element B, even when the former was never placed meaningfully before the jury.

For the above-mentioned reasons, review by this Court is critical to resolve the appellate court's conflict with and violation of the principles in *Ashe*, *Yeager*, and the Double Jeopardy Clause.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
SIXTH DIVISION

[August 28, 2009]

No. 1-07-3373
05 CR 6902

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

HOWARD MORGAN,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County

Honorable Clayton J. Crane, *Judge Presiding*.

ORDER

Defendant, Howard Morgan, was arrested and charged by indictment with the attempt first degree murder of Chicago police officers Timothy Finley, John Wrigley, Nick Olsen, and Eric White. Defendant was also charged with aggravated battery with a firearm against Officers Wrigley, Olsen and White, and with aggravated discharge of a firearm against Officer Finley. A jury found him not guilty of aggravated battery with a firearm against Officers Olsen and White and not guilty of aggravated discharge of a firearm against Officer Finley. The trial court subsequently declared a mistrial on the five remaining

charges after the jury was unable to reach a verdict on those counts. The court set the case for retrial on the remaining five counts and denied defendant's motion to dismiss those counts on the basis of double jeopardy. Defendant appeals, contending that the trial court erred in denying his motion to dismiss because double jeopardy principles bar the State's attempt to reprosecute him for the charges upon which the jury could not reach a verdict. For the reasons that follow, we affirm.

The following evidence was presented at defendant's trial.

Officer Finley testified that at approximately 12:35 a.m. on February 21, 2005, he and his partner, Officer Wrigley, were in full uniform and driving a marked squad car. Officer Finley heard a loud report which he believed to be a gunshot and, as he was driving to investigate, he saw defendant's van approaching the wrong way on a one-way street with its headlights off. The officers followed the van as it made "rolling stops" through several stop signs until it turned right and proceeded south on Lawndale Avenue. Officer Finley activated his squad car's emergency equipment and defendant pulled to the side of the road approximately one block later. Officer Finley parked behind and slightly to the east of defendant's van, and exited his squad car as defendant exited his vehicle.

According to Officer Finley, defendant appeared agitated and asked why he was being pulled over. Officer Finley unholstered his weapon, a SIG-Sauer .9 millimeter pistol, and held it in a "low-ready position," which meant that the gun was pointed toward the ground at approximately a 45-degree angle. Officer Finley drew his weapon because he considered it to

be a "high risk stop," based upon the loud report, the van traveling the wrong way on a one-way street with its light out, the van not pulling over for a block after the squad car's emergency equipment was activated, and defendant jumping out of the van and appearing agitated.

Officer Finley ordered defendant to put his hands on his vehicle and defendant did so. Officer Finley then holstered his weapon and approached defendant on the driver's side of his vehicle. According to Officer Finley, "the second" he put his hands on defendant to conduct a protective pat-down, defendant turned to face the officer and began to struggle. At that point, two other officers who Officer Finley did not know, Eric White and Nick Olsen, came from the north to assist him. Defendant refused Officer Finley's command to stop resisting and to relax, and then defendant and the three officers "went to the ground."

As the struggle progressed, defendant identified himself as a police officer. Officer Finley responded that if that was the case, defendant should stop resisting and relax. Defendant refused to do so and instead continued to struggle while his right arm was underneath his body and his right hand was in his waistband. As Officer Finley was pulling on defendant's right arm to place him in handcuffs, defendant attempted to get up from the ground and his right hand came out of his waistband holding a gun. Officer Finley yelled, "gun, gun, gun," and defendant turned to the east and started to shoot in the direction of Officers White, Wrigley and Olsen. Officer Finley was behind defendant at this time with his weapon holstered and he attempt to tackle or push defendant to the ground but wound up falling on his legs. As defendant continued to fire his weapon from

the ground, Officer Finley pushed off of him and backed up towards the north away from defendant and ran for cover in the direction of his squad car. Defendant continue to fire his weapon at Officers Wrigley and White as Officer Finley ran toward the driver's side door of his squad car. Officer Finley upholstered his weapon as he was running for cover and, with a clear line of fire, shot four to six times in defendant's direction. Officer Finley saw defendant shoot in his direction but did not recall how many times because defendant was "spraying bullets" toward the officers. The officer explained that defendant was not facing the same direction the entire time of the shooting but, rather, that he would shoot at one officer, turn his body, and then attempt to shoot at another officer.

Defendant eventually stopped firing his weapon and was lying on the ground near the front driver's side of his vehicle with his gun near his hands in a "slide lock" position. Finley explained that a "slide lock" can occur when the slide on top of a weapon is pulled back and locked or when all the bullets in a gun have been fired. The officer identified a photograph of a Glock semi-automatic pistol as defendant's weapon. Officer Finley kicked that weapon away from defendant and other officers who had arrived helped place defendant into handcuffs.

On cross-examination, Officer Finley denied that there was a third officer along with himself and Officer Wrigley. He acknowledged that a general offense report, which he did not prepare, did not mention that defendant jumped out of his vehicle and appeared agitated. Officer Finley also testified that Officer Olsen did not fire his weapon during the shooting.

Officer Wrigley testified to substantially the same sequence of events as did Officer Finley. He added that defendant exited his vehicle and said, "what the f*** you stopping me for?" Officer Wrigley unholstered his weapon, a SIG-Sauer .9 millimeter pistol, and kept it to his side and pointed toward the ground. Similar to Officer Finley, Officer Wrigley explained that he unholstered his weapon because of the gunshot he had heard and because defendant had gotten out of his vehicle without being asked. Officer Wrigley told defendant to "relax" and asked him to "get back in his vehicle," but defendant did not do so. The officer then approached the passenger side of defendant's vehicle and again told defendant to relax and to get back into his vehicle. Defendant refused to do so and responded, "what the f***, you harassing me for." Officer Wrigley reiterated his request for defendant to get back into his vehicle and, when it was apparent that defendant was becoming more agitated and would not return to his vehicle, Officer Wrigley told him that the officers were investigating a gunshot they had heard in the area. Defendant responded, "f*** that I'm the police."

Defendant turned around "aggressively" and struggled when Officer Finley attempted to search him. Officer Wrigley holstered his weapon and made his way to the rear of defendant's van to help Officer Finley and then noticed that two other uniformed officers whom he did not know were approaching. As those two officers attempted to help Officer Finley control defendant, Officer Wrigley heard commands such as "relax," "stop resisting," and a repeated order to "give me your hands." Officer Wrigley noticed that defendant had his right hand in his waistband and was beginning to get up from the ground when Officer Finley yelled "gun, gun, gun." Officer Wrigley,

whose gun was holstered, then heard one or two gunshots and saw a muzzle flash coming from the front of defendant and what appeared to be a black semi-automatic weapon in his hand. Defendant turned left and began to fire his weapon towards the south and eventually pointed that weapon at Officer White, who was backing up to the east of defendant. Officer Wrigley saw muzzle flashes coming from defendant's gun and then fired one or two shots in defendant's direction. Defendant pointed his weapon at Officer Wrigley and fired multiple shots. As Officer Wrigley was returning fire, he felt a sharp pain in his left arm and left chest. The officer knew he had been shot but continued to fire his weapon until defendant fell to the ground. He checked his line of fire each time he shot his weapon to make sure that he did not shoot at his fellow officers.

Officer Wrigley ran to the front passenger side of his squad car for cover and did an emergency reload of his weapon. Defendant was sitting prone on the street firing his weapon directly at and to the right of Officer Finley's squad car. Officer Wrigley fired multiple shots at defendant, who then fell backwards with his hand by his side. He stopped firing and returned his weapon to a "low ready" position because it appeared defendant was no longer firing his weapon. Defendant was, however, attempting to make his way to his van and at that point Officers White and Finley approach defendant with their weapons in a low-ready position.

Officer Wrigley noticed a "gaping" hole in his left arm and reached underneath his vest to determine if he was bleeding. When another squad car arrived at the scene, he told an officer that he had been shot and that he needed to go to the hospital. As he was

taking off his jacket at the hospital, a spent bullet fell from the area of his left chest. The doctor dressed a gunshot wound to his left wrist and told him that his vest had stopped the bullet that was fired at his chest.

Officer Olsen testified that he and his partner, Officer White, were in full uniform and driving a marked squad car when they decided to follow Officer Finley's squad car as it drove past them. After Officer Finley pulled defendant over, Officer Olsen parked his squad car behind and to the left of Officer Finley's vehicle. He exited his vehicle and drew his weapon because Officer Finley had exited his vehicle and drawn his weapon. Officer Olsen ran to assist Officer Finley in his attempt to conduct a protective pat-down search of defendant, and, when defendant resisted, the two officers attempted to place defendant into handcuffs. The officer fell to the ground with defendant, who then pushed himself up from the ground and retrieved a pistol from his waistband.

Officer Olsen heard someone yell "gun," and then heard a gunshot and ran north to Officer Finley's squad car for cover. While doing so, he heard a shot and then felt a pain in his right arm. Officer Olsen did not see defendant shoot him because defendant was behind him at the time. The officer drew his weapon but did not fire it because of the pain in his arm and because Officer Wrigley was in his line of fire. His partner later took him to the hospital.

On cross-examination, Officer Olsen denied that there was a female police officer present during the shooting and acknowledged that in his officer's battery report, he erroneously indicated that there were three assisting officers besides himself and his

partner. He also testified that a gunshot residue test was not performed on him.

Officer White corroborated the other officers' testimony that defendant was agitated when he exited his vehicle and that the officers approached defendant with their weapons in a low-ready position. He also drew his weapon, a Smith and Wesson .9 millimeter, and kept it in the same low-ready position. Officer White heard Officer Wrigley tell defendant to relax and explain that the officers were investigating a gunshot in the area. He attempt to aid Officer Finley as he struggled with defendant, who was reaching toward his waistband. Defendant refused multiple commands to stop resisting and to submit to handcuffs while he struggled on the ground with the officers. Officer Finley said, "he's saying he's a cop, be careful, he might have a gun," and then defendant pushed himself off the ground while his arm was inside his waistband. Fearing that defendant had a weapon, Officer White performed a "closed-fist punch" to the back of defendant's head. The blow did not disable defendant or allow the officers to gain control of him.

Defendant pushed himself off the ground and pointed a Glock semi-automatic pistol at Officer Wrigley's chest. Officer White yelled, "gun, gun, gun," and heard a shot as he retreated backwards for cover. Defendant was on his knees and had his weapon pointed at Officer White, who heard a "pop," saw a flash come out of the muzzle and a spark hit the ground, and then felt something hit his leg. The officer then stepped to the south of defendant and fired directly into his back. The shot did not immobilize defendant, so Officer White retreated to the east side of Lawndale as the other officers scattered in different directions away from defendant. Defen-

dant then shot at Officer Wrigley, whose body jerked in a manner that led Officer White to believe that he had been shot. Officer White, who was facing northeast towards the rear of defendant, returned fire towards defendant's back and side.

Defendant continued to fire at the officers, rotating from the direction of Officers Olsen and Wrigley towards the direction of Officers Finley and White. During this time, Officer White was constantly moving north and south so he had a clear line of fire at defendant. At some point, defendant was struck by several shots and, as he fell to the ground, fired a round that Officer White heard sail past his ear. Defendant continued to fire at Officers Olsen, Wrigley and Finley from the ground and then rose to his feet and continued to fire at those officers. Officer White returned fire during this time, and eventually defendant was on the ground and stopped shooting. The officer approached defendant with his weapon drawn and saw defendant reaching toward his weapon, which was lying nearby on the ground in a "slide-lock" position. Officer White saw a navy blue pant leg kick the weapon away from defendant. Officer White drove Officer Olsen to the hospital, where he was also treated with a band aid for a puncture wound to his right calf. He then returned to conduct a walk-through of the scene.

On cross-examination, Officer White testified that he had to move to the south of defendant before firing the shot into his back because Officer Finley was on top of defendant at the time and therefore was in the officer's line of fire. He denied that Officer Olsen was running north in his line of sight at the time he fired into defendant's back or that there was a female officer involved in the shooting. Officer White had

two other weapons registered with the Chicago Police Department at the time, a Smith and Wesson semi-automatic pistol and a Colt .38 Special revolver. His revolver was not examined to determine if it matched any of the rounds fired at the scene, and he testified that a revolver does not eject spent cartridges after it is fired. The officer was aware that Officer Olsen did not turn his handgun into the police department and that a "swab" was not performed on the officer's hands.

Chicago police sergeant Sean Loughran testified that according an event inquiry entered by 911 operators on the date of the shooting, shots were fired by both officers on beat 4233A, which was the beat assigned to Officers White and Olsen. Loughran testified, however, that the information in the event inquiry could have been entered at any time and therefore could have been entered prior to when information had been gathered and confirmed by the police.

Chicago police officer Richard Pruger responded to the scene after hearing a radio call that shots had been fired and that an officer was down. Upon arriving at the scene, he saw defendant lying on his stomach and reaching for a nearby handgun. Officers White and Finley approached defendant with their guns pointed toward the ground and Officer Finley kicked the gun away from defendant's hand. Officer Pruger searched defendant and recovered a cell phone and a billfold. He guarded defendant's weapon until it was recovered by crime scene personnel. Officer Pruger noticed that defendant's vehicle's headlights were on when he arrived.

Justin Dukes, a paramedic for the Chicago fire department, treated defendant at the scene for multiple

gunshot wounds. When Dukes arrived, defendant appeared agitated and was "yelling at everybody in his near vicinity." Dukes identified himself as a paramedic and defendant continued to yell profanities and said that he did not want any help and that the paramedics should just "let him die." While Dukes and his partner were dressing defendant's wounds, defendant became physically combative and struck Duke's partner. The paramedics subsequently transported defendant to the hospital.

Chicago police officer Tom Mitchell arrived at the scene after the shooting and saw several groups of shell casings on the ground and that the lights on defendant's vehicle were on at the time. He saw a .9 millimeter handgun lying on the ground near defendant's van in a "slide-lock" position. Officer Mitchell testified that Officer White, Finley and Wrigley's handguns were taken into evidence by the police, but that Officer Olsen's gun was not recovered and that a gunshot residue test was not performed on the officer's hands.

Paula Alexander testified that on February 21, 2005, she lived on Lawndale within a block of where the shooting took place. Alexander was in bed on February 21, 2005, when she heard a vehicle traveling down the street at a high rate of speed and then stop. Approximately five minutes later, she heard gunshots coming from the corner of 19th Street and Lawndale and went to her living room window that faced onto Lawndale. She saw numerous police cars in the area and then noticed that there was a bullet hole through the window and that the glass was shattered. She traced the bullet and found that it had landed on the side of her couch. She notified the

police, and Officer Mark Mizula testified that he recovered that spent bullet.

Dr. Andrew Dennis, a trauma surgeon at Cook County Hospital, treated Officer Wrigley after the shooting and saw a spent bullet fall from the officer's clothing as he undressed. Officer Wrigley presented two injuries, the first being a large laceration to his left forearm caused by a bullet grazing "the meat" of his arm, and the second being a large bruise in the area where the arm meets the chest that was caused by a bullet impact.

Chicago police officer Edward Pakula accompanied Officer Wrigley to the hospital. He saw a spent bullet fall from Officer Wrigley's jacket, which he recovered and inventoried. Chicago police officer Nina Moore was also at the hospital with Officer Wrigley and saw the spent round fall from his jacket. Officer Moore collected Officer Wrigley's personal belongings, including his service pistol.

Dr. Phillip Zaret, a trauma surgeon at Mt. Sinai hospital, treated Officer Olsen following the shooting. Officer Olsen had a gunshot wound to his arm caused by a bullet that entered the back of his arm and exited through the front.

Dr. Zaret also treated defendant and counted 28 holes on the front and back of his body. Specifically, defendant had a gunshot wound to his right neck, four entrance wounds under his rib cage, two entrance wounds on the front of his arm on the right side and four gunshot wounds to the front of his left leg. Defendant had four gunshot wounds to his back, six gunshot wounds to the back of his left leg, and four or five gunshot wounds to the back of his right leg. Defendant had "through and through" injuries to

his liver, kidney, diaphragm, and colon, as well as an open fracture to his left leg and a fracture to his right arm. Dr. Zaret retrieved three bullets from defendant's body during surgery. A toxicology report was not performed on defendant, which he explained was normal under the circumstances.

The parties stipulated that defendant's clothing was recovered following surgery and ultimately given to forensic investigators Joseph Bembbynista and John Kaput.

Chicago police forensic investigator Maurice Henderson testified that he and his partner arrived at the scene at approximately 1:25 a.m. They photographed and videotaped the scene and collected a large amount of ballistics evidence, including multiple fired bullets, fragments and shell casings. Henderson and his partner recovered defendant's weapon and sent it to the Illinois State Police crime lab for fingerprint analysis, and also recovered a fired bullet from 3648 West 19th Street. On cross-examination, Henderson testified that the lights on defendant's van were on when he arrived, that he could not tell where someone was standing when spent cartridges were ejected, and that in addition to the 19 spent "RP" .9 millimeter shell casings he found at the scene, he also found one unfired RP .9 millimeter bullet underneath defendant's vehicle.

Chicago police forensic investigator John Kaput testified that he collected and inventoried Officer Olsen's clothing from the hospital and also inventoried the clothing belonging to Officer Wrigley and defendant. Kaput inventoried the handguns belonging to Officers Finley, White, and Wrigley. He did not collect a weapon from Officer Olsen and was not

asked to swab the hands of defendant or Officer Olsen for gunshot residue.

Robert Berk, a forensic scientist for the Illinois State Police and an expert in trace evidence analysis, testified that he examined the jacket and sweater that were recovered from defendant. Berk testified that the right cuff from the jacket contained unique and consistent gunshot residue particles, which is the basis for a positive test result. This result indicated that the right cuff of the jacket had either contacted a primer gunshot residue item or was in the environment of a firearm when it was discharged. Berk explained that a positive test result indicated that a person either discharged a weapon, came in contact with an item that had primer gunshot residue on it, or was in an environment of a firearm when it was discharged. Regarding the samples taken from the left and right cuff of the sweater, Berk found only one unique particle of gunshot residue along with consistent gunshot residue particles. The presence of one unique particle is insufficient to establish a positive test result, so Berk classified both test results as negative, meaning that either the surfaces had not been in the environment of a discharged firearm or that the particles had been removed by activity or had not been deposited. Berk was not asked to perform a gunshot residue test of Officer Olsen's clothing, but he testified that the crime lab would accept testing requests from the State and the defense.

Jennifer Barrett, a forensic scientist and expert in the area of latent fingerprints, testified that she examined the firearms evidence recovered in this case and found no fingerprints to compare. For example, she examined the shell casings in this case and found no suitable latent impressions. According to Barrett,

she has examined shell casings thousands of times in her career and only once did she find latent prints on them. Barrett also examined the Glock handgun and magazine that were found next to defendant and found no latent fingerprints. Barrett explained that the handle and trigger of the weapon had a textured surface that made it difficult to find a latent fingerprint impression. Likewise, the back of the grip and the slide grip of the weapon were not conducive to finding fingerprints.

Illinois state police forensic scientist William Demuth, an expert in firearms examination, examined the firearms evidence recovered in this case, including expended shell casings, fired bullets and fragments, defendant's Glock semi-automatic-pistol, and the weapons belonging to Officers White, Wrigley and Finley. Demuth explained that only defendant's Glock had polygonal rifling, which does not allow for the positive identification of a bullet as having been fired from a particular weapon. Polygonal rifling, however, does not prevent the positive identification of a shell casing having come from a particular weapon. Demuth testified that on the date of the shooting, Chicago police officers were not allowed to carry weapons that have polygonal barrels.

Demuth concluded that the fired bullet recovered from Officer's Wrigley's vest had polygonal rifling and therefore could not have been fired from any of the officers' handguns. Demuth could not identify or eliminate the fired bullet as having been fired from defendant's Glock. Two fired bullet fragments recovered from the driver's side door panel of Officer Finley's squad car also exhibited polygonal rifling and therefore could not have been fired from any of the officers' weapons. Demuth could not identify or

eliminate the two bullets as having been fired from defendant's Glock. A fired bullet recovered from the wall of the apartment at 3648 West 19th Street also had polygonal rifling. A fired bullet jacket fragment recovered from just north and east of defendant's van exhibited polygonal characteristics and therefore could not have come from the officers' weapons and could not be identified or eliminated as having been fired from defendant's Glock. The 17 fired cartridges recovered in close proximity to where defendant was located on the east side of his van were all Remington brand cartridges which, aside from one unfired bullet, were the only Remington brand cartridges found on the scene. All 17 of those cartridges were fired from defendant's Glock. One unfired bullet recovered from the driver's side front tire area of defendant's van was also a Remington brand bullet.

Demuth testified that one of the fired bullets recovered from defendant's body during surgery was positively identified as having come from Officer Wrigley's gun, two were positively identified as having been fired from Officer White's gun, and three lead fragments were unsuitable for comparison.

Demuth further testified that a bullet recovered from the driver's side door of defendant's van was positively identified as having been fired from Officer Wrigley's gun, a fired bullet recovered from in front of defendant's van was positively identified as having been fired from Officer Wrigley's gun, and a bullet recovered from the top of the van was positively identified as having been fired from Officer Wrigley's gun. A bullet recovered from the driver's side rear storage area and wheel well rear quarter panel of defendant's van could not be identified or eliminated as having been fired by Officer Finley's gun or Officer

Wrigley's gun, but was not fired from Officer White's gun or defendant's gun. A metal fragment recovered from next to defendant's van could not be eliminated as having been fired from either Officer Wrigley or Finley's gun, but was not fired from Officer White's gun or defendant's gun. Bullets recovered from the center front floor area and from underneath the driver's seat of defendant's van were positively identified as having been fired from Officer White's gun. A fired bullet recovered from underneath defendant's van and a fired bullet recovered from behind defendant's van were positively identified as having been fired from Officer White's gun. Fired cartridge casings recovered from north and west of defendant's van were positively identified as having been fired from Officer Finley's gun. Fired cartridge casings recovered from east of defendant's van and from the intersection of 19th and Lawndale were positively identified as having been fired from Officer White's gun.

A spent casing recovered from the windshield wiper area of Officer Wrigley's squad car was positively identified as having come from Officer Wrigley's gun, and numerous spent casings from the intersection of 19th Street and Lawndale and just northeast and north of defendant's van were all positively identified as having come from Officer Wrigley's gun.

A bullet recovered from under a car located at 1902 Lawndale was positively identified as having been fired by Officer Finley's gun, and a cartridge case recovered from a puddle located at the scene was positively identified as having been fired from Officer Finley's gun. A fired bullet recovered from next to a red van parked south of defendant's van could not be identified or eliminated as having been fired from

Officer Wrigley or Officer Finley's gun, but was not fired from Officer White's weapon or defendant's gun. The bullet recovered from 1866 South Lawndale was positively identified as having been fired from Officer White's gun. A bullet recovered from the scene east of defendant's van could not be positively identified or eliminated as having been fired from Officer White's gun, but could not have been fired from Officer Finley's gun, Officer Wrigley's gun, or defendant's gun. A fired bullet recovered from the curb in front of 1902 South Lawndale could not have been fired from Officer Finley's gun, Officer Wrigley's gun or defendant's gun, but could not be identified or eliminated as having been fired from Officer White's gun.

Zbieniew Niewdach, a forensic investigator for the Chicago police department, went to the police auto pound on the day of the shooting and recovered firearm evidence from defendant's van and Officer Finley's squad car. Niewdach testified that he did not conduct "rodding" on the bullet holes in defendant's van, which is a process used to determine the angle in which the bullets entered the vehicle.

The parties stipulated that if called as a witness, Craig Villanova would testify that he was the record keeper for a company that was in the business of selling firearms and would identify a sales document reflecting that defendant bought a Glock model 17 pistol on January 24, 1995.

Larry Grubb of the Illinois state police testified that all Illinois residents are required to possess a firearm owner identification card (FOID) in order to acquire and possess a handgun in Illinois, and that defendant did not have a valid FOID card on the date of the shooting.

Barbara McCain, a data entry operator for the Chicago police department auto pound, testified that she sent two letters via certified mail to defendant's home in February and March of 2005 informing him that his van was being held for ten days and could be picked up at the auto pound thereafter. The letters were not claimed, and McCain testified that she was not told that defendant was in custody because criminal charges were pending against him. Chicago police officer Kevin Pye, who worked at the police department's auto pound, testified that an unclaimed vehicle with bullet holes is normally crushed and that defendant' vehicle was crushed in April 2005

The State then rested its case. Defendant called seven character witnesses on his behalf, and each testified to defendant's reputation in the community for being peaceful, law-abiding and truthful.

Charice Rush testified that at the time of the shooting she was sitting in a car that was parked outside of the building at 1863 South Lawndale. According to Rush, a grey van drove past her and stopped at the intersection of 19th and Lawndale, and then went through the intersection and pulled to the side of the road. A squad car containing two white male police officers pulled behind the van, and another squad car containing three white police officers, two male and one female, pulled in front of the van. The two officers from the first squad car approached and began to speak with defendant, who was seated inside his vehicle. The other three officers then approached the van and defendant was asked to exit his vehicle. All five officers then grabbed defendant and forcefully pulled him out of his van and yelled at him to "get down on the ground." The officers surrounded defendant and attempted to push him down

to the ground. Rush did not see a gun in defendant's hands, which were behind his back as he was struggling with the officers.

Rush then heard an officer yell, "he has a gun," and she saw that defendant's hands were still behind his back. She heard a shot and then turned and ran away a short distance until she stopped, turned around, and saw "a lot of shooting." Defendant was slumped over on the ground and was not shooting at the officers. When the shooting stopped, Rush entered a nearby apartment and looked outside and saw officers "everywhere." The police came to the apartment and Rush told a policeman that she did not see what had happened. Rush explained that she did not want to go to the police station and explain what she witnessed because her sister-in-law's sister had just passed and the funeral was the following day. More police eventually came to the apartment and Rush went to the police station and related the same version of events to which she had testified. She later told the same version of events to an Assistant State's Attorney (ASA) and also signed a handwritten statement. Rush later spoke to the police at a "round table" and also testified before a grand jury.

On cross-examination, Rush testified that she did not know if she told the police at the round table that she was too far away to see if defendant had a gun in his hands and that she did not know who fired which shots. Rush acknowledged that, according to the handwritten statement, she saw both squad cars pull behind the grey van. She also acknowledged that nowhere in the statement did she state whether she saw defendant with a gun in his hand or that she saw five police officers surround defendant and shoot at him.

Rush further testified that she spoke to ASA Michelle Papa on February 24, 2005, and, when asked what happened during the shooting, she did not tell the ASA that there were five police officers, that one was a woman, that she could see defendant's hands during the entire incident and never saw him holding a gun, or that all five officers surrounded defendant while he was on the ground.

On redirect examination, Rush testified that she told the truth in the handwritten statement, that certain things were left out of it, and that, at the time of the statement, she was 18 years old, did not have an attorney, and was in the presence of many police officers.

Defendant testified on his own behalf. He was a Chicago police officer for five years, beginning in 1979, and in 1992 he became a Burlington Northern Santa Fe (BNSF) railroad police officer. According to defendant, he worked from 6 a.m. until 2 p.m. on February 20, 2005. He then went to his sister-in-law's home and left for his home, which was a block from the shooting, at approximately midnight. Defendant was driving with his headlights on and stopping at all stop signs when he was pulled over by the police. Two officers approached with their weapons pointed directly at defendant, who had a Glock semi-automatic pistol in his waistband. As the officers approached, defendant made his hands visible and shouted through the partially open window that he was a police officer. He asked if there was a problem, but the officers did not respond and continued to approach his vehicle. Defendant was ordered to exit his vehicle and before he could lower his hands to reach the door handle, the officers "snatched" him out of his van. The officers grabbed his arms, pressed

down on his shoulders, and said, "get you're a** down," and "get the f***" down." Defendant did not recall seeing a second police unit, but "felt" that there were more than two officers and "felt" other hands pushing on him. Defendant was down on one knee and repeated that he was a police officer and asked if there was a problem. He was then struck on the left side of his head and "lurched" back onto the officers. He felt the officers' hands on his body and then felt someone pull his weapon from his waistband. He heard "gun, gun," and was then shot in the chest and stomach. Defendant became unconscious and the next thing he remembered was waking up at the hospital.

Defendant testified that he did not put his hands on his weapon or fire it at the officers. Defendant also testified that in March of 2004, he had never been convicted of a felony, did not have mental problems, and was not addicted to narcotics. He acknowledged that he filed lawsuits against the four officers involved seeking damages for his injuries and that he previously filed a lawsuit against BNSF, alleging that he was not promoted because of a conspiracy against him based upon his race. He did not see or hear a female office during the incident.

In rebuttal, the State called Kenneth Shaw, a special agent for BNSF. Shaw testified that defendant would wear a star he "made up" on a chain around his neck instead of the BNSF issued shield. During a conversation, defendant indicated that Chicago police officers wear a star and "if you wear the shield people think that you are a security guard."

ASA Catherine Nauheimer testified that she was present at the round table when Rush was asked questions about the shooting. According to the ASA,

Rush told the investigators that she saw two squad cars pull defendant over and that, when defendant exited his vehicle, the police told him to get on the ground. Rush saw the officers struggling with defendant and then heard someone say, "he's got a gun, he's got a gun." She could not tell who was firing the gunshots that she heard and never mentioned having seen five officers, that one of them was a female, that the police "snatched" defendant from his vehicle, that the officers stood around defendant shooting at him, or that defendant's hands were behind his back. Rush also told investigators that she did not see if the driver had a weapon in his hand because she was too far away. The ASA also took Rush's handwritten statement and testified that Rush essentially reiterated the statements she had made at the round table.

ASA Papa testified that she interviewed Rush prior to her grand jury testimony and asked her open-ended questions about the shooting. Rush did not mention the five officers, a female officer, defendant being snatched from his van, the police surrounding defendant and shooting at him, the fact that she could see defendant's hands the whole time and did not see him with a gun, or that defendant's hands were behind his back when the police were shooting at him.

The trial concluded on May 9, 2007, and the defense chose not to give a closing argument. The jury then began their deliberations and was sequestered for the night. The jury sent two notes to the trial court the following day, stating that they had reached an impasse and could not agree. The court gave the jury *Prim* instructions and, on the following day, May 11, 2007, the jury sent a note indicating that it reached a decision on three counts but were deadlocked on the

remaining five. Over defense counsel's objection, the trial judge stated that he would accept the jury's verdicts and then question the jury foreperson as to whether further deliberations might result in a decision on the remaining counts.

The jury found defendant not guilty of the two counts on aggravated battery with a firearm against Officers Olsen and White and not guilty of aggravated discharge of a firearm against Officer Finley. The jury foreman told that the court that in his opinion, further deliberations would not result in a verdict on the remaining counts. The court instructed the jury to continue its deliberations and then there was an "outburst" as the jurors returned to the jury room.

The following day, the trial court stated that it had determined that some of the jurors' cell phones were not collected. The court questioned each juror individually as to whether they had used their phones and as to the substance of any conversations they had. Although 10 of the 12 jurors had used their phones, only two of them had relevant discussions with outside parties. One juror spoke to her husband, who told her that there were police officers and "news people" outside of the courthouse. The juror stated that this did not influence her deliberations in the case. Another juror spoke to "Renee," who she said was "an alternate juror," and told her that the jury was being detained overnight because one of the other jurors would not agree with the rest of the jury. The juror stated that she did not discuss the facts of the case nor was she provided with any information about the case. The court discussed the issue with the attorneys and stated that it did not find anything in the jurors' responses indicating that they were

influenced as to how they should decide the case. Therefore, the court concluded that it would instruct the jury to continue deliberating.

The court then stated that as the jury was being brought back into the room, two jurors indicated to the sheriff that they had additional information regarding cell phone use. One of the jurors stated that she "signed it wrongly saying he was not guilty. I feel he was on that one, on the one with the shrapnel. *** I feel like I shouldn't have signed not guilty." The court stated that it would not discuss or address the issue. The court further stated that the juror had hesitated when she was polled but that she had stated it was her verdict. The juror further informed the court that she had asked her husband for "Judge Nowinski's phone number" to discuss whether she could "take back [her] vote," but the judge never called her back.[1] The court stated that it would not discuss or address the issue of whether the juror had changed her mind regarding her verdict.

The court also brought another juror out for examination who had previously indicated that she had not received or made any calls on her cell phone. The juror informed the court that she had spoken with her son and daughter about why she was not coming home but that neither gave her any information about the case.

The State then moved for a mistrial, arguing that the jury was "beyond repair" and that the court should declare the jury hung on the remaining counts. The defense opposed the State's motion, asking the court to allow the jury more time to reach a verdict on the

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[1] Judge Nowinski was not the presiding judge at defendant's trial.

pending charges. The court stated that based upon the responses from the jurors, he did not agree that the jury was "beyond repair" and that he would instruct the jury to continue to deliberate. Defense counsel informed the court that it would consider moving forward if the court dismissed the juror who expressed reservations about her verdict, but the court stated it would not dismiss the juror and that it did not believe any of the jurors were tainted.

After a short recess, the court made the following statements:

> "I've received two notes from the jury. One was five minutes after the other.
>
> The first note reads 'your honor, Kate and Deborah are not emotionally fit to be here any more. We're' it's somewhat misspelled, 'upset, angry, and that's causing us to be physically ill. Thank you, Deborah Simon and Katherine Burke.'
>
> Before I address that because I think that led to a second note at 11:55 a.m. I received a note, 'your Honor, we cannot reach a decision. We are deadlocked.' There are twelve signatures beneath that for the twelve jurors.
>
> I will indicate that I have had occasion to observe the physical and emotional situation which each of these jurors when we questioned them earlier today. If I get the same answer when I go back out there from the foreman, I will declare a mistrial in this case."

Defense counsel raised the possibility of proceeding with ten jurors. The State indicated it was opposed to this possibility and that it was irrelevant whether two of the jurors were physically ill given the subse-

quent note stating the jury was deadlocked. The court then stated:

> "It is apparent to me the first note that I received those two jurors are frustrated. They have -- one need only stand in this courtroom and hear, although not words, but sounds coming from the jury room. Their reactions to the questions here, the emotional makeup of the jurors, crying. Under those circumstances, I'm just going to declare a mistrial. I won't consider proceeding any further."

Defense counsel objected for the record. The court then questioned the jury foreman, who stated that the jury was deadlocked and that, in his opinion, the jury was unable to reach a verdict and any further discussions would be "fruitless." Based upon that response, the trial court declared a mistrial.

The trial court set the case for retrial on the remaining five counts and defendant filed a motion to dismiss those counts on the basis of double jeopardy. Defendant asserted that by its verdict, the jury necessarily determined that he did not discharge his firearm during the shooting and that this finding of fact was inconsistent with facts that the State would be required to prove in the subsequent prosecution of the remaining counts upon which the jury hung. The trial court denied defendant's motion, stating that there were other issues involved in the case besides whether defendant discharged his firearm. This appeal followed.

Defendant contends that double jeopardy principles bar his reprosecution for the five counts upon which the jury could not reach a verdict.

The double jeopardy clauses of the United States and Illinois Constitutions protect a criminal defendant

from repeated prosecutions for the same offense. U.S. Const., amend. V; Ill. Const. 1970, art. I, § 10. The Supreme Court has recognized that the Double Jeopardy Clause "embodies two vitally important interests." *Yeager v. United States*, No. 08-67, slip op. at 6 (U.S. June 18, 2009). The first interest is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88, 78 S. Ct. 221, 223 (1957). The second interest is "the preservation of 'the finality of judgments.'" *Yeager*, slip op. at 7, quoting *Crist v. Bretz*, 437 U.S. 28, 33, 57 L. Ed. 2d 54, 57, 98 S. Ct. 2156, 2159 (1978).

The first interest is implicated when, as in this case, the State seeks to retry a defendant for an offense after its first attempt results in a mistrial due to a hung jury. *Yeager*, slip op. at 7. In these circumstances, however, the subsequent prosecution is not barred by double jeopardy principles. Rather, the jury's failure to reach a verdict is an instance of "manifest necessity" which permits the trial court to declare a mistrial and retry the defendant. *See Richardson v. United States*, 468 U.S. 317, 323-24, 82 L. Ed. 2d 242, 246, 104 S. Ct. 3081, 3085 (1984); *Yeager*, slip op at 7. The Court has explained that the declaration of a mistrial because of a hung jury is not an event that terminates the original jeopardy that attached when the jury was first impaneled and therefore a defendant remains in continuing jeopardy following prosecution for an offense that results in a hung jury and he may be retried for that

offense without violating double jeopardy principles. *Richardson*, 468 U.S. at 324-26, 82 L. Ed. 2d at 246-47, 104 S. Ct. at 3085-86; *Yeager*, slip op. at 7.

In this case, defendant does not contend that the jury's inability to reach a verdict on five of the charges against him prohibits the State from retrying him for those offenses. Rather, relying principally upon the Supreme Court's decision in *Ashe v. Swenson*, 397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189 (1970), defendant argues that his retrial is barred by the doctrine of collateral estoppel. Defendant's argument therefore implicates the second principle embodied in the double jeopardy clause, the interest in the preservation of judgments.

The party seeking to invoke collateral estoppel must show that: (1) the issue was raised and litigated in a previous proceeding; (2) that the determination of the issue was a critical and necessary part of the final judgment in a prior trial; and (3) the issue sought to be precluded in a later trial is the same one decided in the previous trial. *People v. Jones*, 207 Ill. 2d 122, 139 (2003).[2] The defendant bears the burden of proving that the jury necessarily determined the issue in a prior proceeding. *Wharton*, 334 Ill. App. 3d

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[2] The parties refer to the doctrine as both "collateral estoppel" and "direct estoppel." It has been held that direct estoppel is the appropriate doctrine to apply to the circumstances of this case because a retrial is not collateral when it is a continuation of the first trial. See *People v. Wharton*, 334 Ill. App. 3d 1066, 1078 (2002). However, the difference is one of nomenclature only and the same rules apply to both doctrines. *Wharton*, 334 Ill. App. 3d at 1078, citing *People v. Daniels*, 187 Ill 2d 301, 320 n. 3 (1999). The Supreme Court has recognized that the more descriptive term "issue preclusion" is currently used instead of collateral estoppel (see *Yeager*, slip op. at 9 n.4), and we therefore will also use that term.

at 1077-78, citing *Dowling v. United States*, 493 U.S. 342, 350-51, 107 L. Ed. 2d 708, 719, 110 S. Ct. 668, 673 (1990). Our review of the issue presented by defendant's appeal is *de novo*. See *Wharton*, 334 Ill. App. 3d at 1077.

In *Ashe*, the Supreme Court held that the double jeopardy clause precludes the government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial. *Ashe*, 397 U.S. at 446-47, 25 L. Ed. 2d at 477, 90 S. Ct. at 1195. In that case, six men playing poker were robbed by a group of masked men. The defendant was tried for—and acquitted of—robbing one of the players. The State then sought to retry the defendant for the robbery of one of the other victims. The Supreme Court held that the subsequent prosecution was barred on collateral estoppel grounds. *Ashe*, 397 U.S. at 447, 25 L. Ed. 2d at 477, 90 S. Ct. at 1195. The Court noted that collateral estoppel stands for the principle that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit" *Ashe*, 397 U.S. at 443, 25 L. Ed. 2d at 475, 90 S. Ct. at 1194. The Court explained the inquiry that must be made in order to determine what a jury has necessarily decided:

> "[A] court [should] examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ashe*, 397 U.S.

at 444, 25 L. Ed. 2d at 475-76, 90 S. Ct. at 1194. (Internal quotation marks omitted).

Reasoning that, in the case before it, the only contested issue at the first trial was whether the defendant participated in the robbery, the Court held that the jury's verdict of acquittal estopped the State from prosecuting the defendant for robbing a different player because such a prosecution would require the jury to decide if the defendant participated in the robbery. *Ashe*, 397 U.S. at 446, 25 L. Ed. 2d at 478, 90 S. Ct. at 1195-96.

In this case, defendant argues that the acquittals for aggravated battery with a firearm against Officers Olsen and White and for aggravated discharge of a firearm against Officer Finley preclude the State from retrying him for the four counts of attempt murder and for aggravated battery with a firearm against Officer Wrigley. Defendant asserts that, in acquitting him of those counts, the jury necessarily decided that he did not discharge a firearm during the incident. Accordingly, because reprosecution for the charges upon which the jury hung would require the State to prove that he did discharge a firearm, defendant asserts that the issue preclusion component of the double jeopardy clause bars a second trial of that issue and mandates that the charges against him must be dismissed.

The State initially responds that, when the hung counts are considered along with the acquittals, issue preclusion cannot be applied to the facts of this case. According to the State, if a truly rational jury determined that defendant did not discharge a firearm, then it would have acquitted him of the attempt murder charges. Because the jury did not do so, the State asserts that it is impossible to decide what the

jury necessarily determined and that this conflict between the hung counts and the acquittals bars the application of issue preclusion in this case.

Contrary to the State's argument, the Supreme Court recently held that an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to reach a verdict on other counts does not affect the preclusive force of the acquittals under the Double Jeopardy Clause. *Yeager*, slip op. at 1. The court reasoned that "a hung count is not a 'relevant' part of the 'record of [the] prior proceeding,'" and that "[b]ecause a jury speaks only through its verdict, its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle." *Yeager*, slip op. at 10, quoting *Ashe*, 397 U.S. at 444, 25 L. Ed. 2d at 474, 90 S. Ct. at 1194. According to the Court, "[a] host of reasons—sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few—could work alone or in tandem to cause a jury to hang," and therefore an attempt to ascribe meaning to a hung count amounted to "guesswork." *Yeager*, slip op. at 10-11. Accordingly, the court held that courts should not consider the hung counts when conducting issue-preclusion analysis, and that an inquiry into what the jury decided should be "confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration." *Yeager*, slip op. at 11-12.

Therefore, considering the record from defendant's trial without reference to the counts upon which the jury could not reach a verdict, our inquiry in this case is "whether a rational jury could have grounded its verdict upon an issue other than" the issue of

whether defendant discharged a firearm during the shooting. *Ashe*, 397 U.S. at 444, 25 L. Ed. 2d at 475-76, 90 S. Ct. at 1194. For the reasons that follow, we conclude that a rational jury could have grounded its verdict on an issue other than whether defendant discharged a firearm and that defendant has failed to meet his burden of establishing that the jury necessarily decided the issue that he now seeks to foreclose from consideration.

In this case, the trial court instructed the jury that to sustain the charge of attempt first degree murder of a peace officer, the State was required to prove the following propositions:

> "First: The defendant performed an act with constituted a substantial step towards the killing of [Timothy Finley, John Wrigley, Nicholas Olsen, Eric White], and second: That the defendant did so with the intent to kill that individual, and third: That the individual the defendant intended to kill was a peace officer, and fourth: That the defendant did so at a time when that peace officer was in the course of performing his official duties, and fifth: That the defendant knew or should have known that the individual was a peace officer."

The trial court also instructed the jury that to sustain the charge of aggravated battery with a firearm, the State was required to prove the following propositions:

> "First: That the defendant intentionally or knowingly caused injury to [John Wrigley, Nicholas Olsen, Eric White], and second: That the defendant did so by discharging a firearm."

The court further instructed the jury that to sustain the charge of aggravated discharge of a firearm,

the State was required to prove the following propositions:

> "The defendant knowingly discharged a firearm, and second: That the defendant discharged the firearm in the direction of Timothy Finley, and third: That the defendant knew that Timothy Finley was engaged in the execution of his official duties."

Initially, we consider the preclusive effect of the acquittals on the charges relating to Officers Olsen and White. We find that defendant has failed to establish that the jury necessarily determined that he did not discharge a firearm by acquitting him of aggravated battery with a firearm against Officers Olsen and White. Contrary to defendant's argument, this charge required more than simply proof that defendant discharged a firearm. It also required the State to prove that the injuries suffered by Officers Olsen and White were caused by defendant. Based upon the nature and lack of specific physical evidence linking those injuries to defendant's gun, we believe that the jury could have concluded that the State failed to establish this element of the offense.

With respect to Officer Olsen, the bullet that passed through his arm was not recovered and therefore was not identified as having been fired from a particular weapon. Officer Olsen also did not see who shot him and none of the other officers testified that they saw defendant fire the shot that caused Officer Olsen's injury. With respect to Officer White, the shrapnel that hit his leg was not recovered and therefore was not identified as having been fired from a particular weapon. Moreover, none of the other officers testified that they saw defendant fire the shot that caused the injury to Officer White's leg. The nature of this

evidence stands in contrast to the physical evidence connecting defendant to the shot that injured Officer Wrigley, who was the victim in the only count of aggravated battery upon which the jury could not reach a verdict. According to Officer Wrigley, defendant fired multiple shots at him and he felt a sharp pain in his arm and chest. Although the bullet that grazed the officer's arm was not recovered and therefore not identified as having been fired from defendant's gun, the bullet that hit him in the chest was recovered. Specifically, multiple witnesses testified that as Officer Wrigley was removing his jacket at the hospital, a spent bullet fell to the ground and was recovered by the police. The testimony of the ballistics expert established that this bullet could not have been fired from any of the officers' weapons. Additionally, Officer White testified that when defendant shot at Officer Wrigley, the officer's body jerked in a manner that led White to believe that Wrigley had been shot. Under these circumstances, we believe that the lack of physical evidence connecting defendant's gun to Officer Olsen and Officer White's injuries provided an alternative basis upon which the jury could have acquitted defendant of the aggravated battery charges against these officers. This basis, however, would not preclude the jury from finding that defendant took a substantial step towards the attempt murder of Officers Olsen and White.

This conclusion is supported by the other evidence presented at trial. The testimony provided by the officers suggests that the circumstances at the time of the shooting were chaotic. According to those officers, defendant pulled his handgun from his waistband while struggling with the officers on the ground and then began to fire shots. The officers then scattered in different directions and returned fire.

According to the officers, they were not able to fire their weapons at certain times because other officers were in their line of sight. Defendant raised the issue of whether the officers' injuries could have been caused by "friendly fire," and challenged the position of the officers and the angles at which they fired their weapons. The record therefore establishes that, according to the police, numerous shots were fired in multiple directions by a number of weapons during the incident. This depiction of the shooting is consistent with the ballistics evidence, which established that the scene was littered with numerous shell casings, fired bullets and bullet fragments, unfired bullets and bullet holes. We believe that this evidence could have contributed to the jury's doubt as to whether it was defendant who fired the shots that actually caused the officers' injuries. Therefore, because defendant has failed to establish that the jury necessarily determined he did not discharge a firearm by acquitting him of the aggravated battery charges, we find that he may be retried for the attempt first degree murder of Officers Olsen, White, and Wrigley without violating double jeopardy principles.

We next consider the preclusive effect of defendant's acquittal on the charge of aggravated discharge of a firearm against Officer Finley. We find that defendant has failed to meet his burden of establishing that, in acquitting him of that charge, the jury necessarily determined that he did not discharge his firearm. This charge also required the State to prove not just that defendant discharged his weapon, but that he knowingly did so in the direction of Officer Finley. Contrary to defendant's argument, the jury could have acquitted him of this charge by finding that, although he discharged a firearm, he did not knowingly do so in Officer Finley's direction. Although

Officer Finley testified that defendant fired in his direction, defendant challenged that officer's observations and all of the officers' testimony established that the scene during the shooting was chaotic, that defendant was "spraying" bullets in multiple directions, and that the officers were also returning fire from multiple angles. Additionally, no specific bullet was found corroborating that defendant fired a shot in Officer Finley's direction, and the bullets that were recovered could not be conclusively established as having been fired from defendant' s weapon. Thus, the jury could have acquitted defendant of the aggravated discharge count because it was unconvinced that defendant knowingly discharged his weapon in Officer Finley's direction. This finding, however, does not mean that the jury necessarily found that he did not discharge his weapon or that the jury was unconvinced that he took a substantial step in an attempt to kill the officer. Accordingly, defendant's reprosecution for the attempt first degree murder of Officer Finley is not barred by double jeopardy principles.

We also note that the jury acquitted defendant of both charges which listed Officer Wrigley as the victim. Therefore, we fail to see how defendant can establish that the jury necessarily made any specific finding with respect to this officer, and, for this reason as well, we find that defendant may be retried for the charges listing Officer Wrigley as a victim without violating double jeopardy principles.

Defendant nevertheless argues that the jury was presented with two versions of the shooting, the one to which he testified and the version testified to by the police, and that the acquittals meant that the jury necessarily decided that his version of events

was the truth and that he did not discharge a firearm during the shooting. However, a jury is free to accept or reject all or part of a witness' testimony (*In re Detention of Lieberman*, 379 Ill. App. 3d 585, 600 (2007)), and therefore the verdicts in this case do not necessarily establish that the jury credited all or even a part of defendant's version of events. Moreover, defendant's argument discounts the possibility that the jury's verdict could have been based upon its conclusion that the State had not met its burden of proof as opposed to the conclusion that defendant's version of events was the truth. Defendant's argument also ignores the evidence establishing that the right cuff of his jacket tested positive for gunshot residue and that Rush's testimony, which defendant claims corroborates his version of events, was severely impeached at trial.

For the reasons stated above, we find that the trial court did not err in denying defendant's motion to dismiss and that defendant may be retried without violating double jeopardy principles for the five counts upon which the jury could not reach a verdict.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

MCBRIDE, J., with CAHILL, P.J., and J. GORDON, J., concurring.

APPENDIX B

Supreme Court of Illinois
Clerk of the Court
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

March 24, 2010

Ms. Barbara D. Klein
Bourgeois & Klein
801 S. Plymouth Ct., Suite 306
Chicago, IL 60605

No. 109708 - People State of Illinois, respondent, v. Howard Morgan, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 28, 2010.

APPENDIX C

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 1-07-3373

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

HOWARD MORGAN,
Defendant-Appellant.

ORDER

This cause coming on to be heard on Appellant's Petition for Rehearing, and the court being fully advised in the premises, IT IS HEREBY ORDERED that the petition is DENIED.

/s/ Cahill, J.
Justice

/s/ Gordon, J.
Justice

/s/ McBride, J.
Justice

ORDER ENTERED
DEC 02 2009
APPELLATE COURT, FIRST DISTRICT

APPENDIX D

STATE OF ILLINOIS)
)
COUNTY OF COOK)

IN THE CIRCUIT COURT OF THE COOK
JUDICIAL CIRCUIT COOK COUNTY, ILLINOIS

Indictment No. 05 CR 6902
Charge: Attempt First Degree Murder

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

vs.

HOWARD MORGAN,
Defendant.

REPORT OF PROCEEDINGS

[D-1] REPORT OF PROCEEDINGS of the Motion before the Honorable CLAYTON J. CRANE, Judge of said Court, on the 19th day of October, A.D. 2007.

* * *

[D-40] The principle issue that has been argued before this Court today is an issue of double jeopardy. In anticipation of this argument, I have reviewed both the documents filed by the Petitioner and the documents filed by the State.

Most importantly, I have reviewed the entire transcripts of the trial, the charging documents, and I have read and re-read the jury instructions in this matter because the issue before this Court is whether or not Mr. Morgan is going to be placed in jeopardy

again for the five counts for which the jury did not arrive at a decision in this case.

The argument made by counsel after I received the original pleadings from the State and the original pleadings from the State and from the Petitioner, kind of like the arguments of most people, spend most of their time attacking each other rather than addressing the principle issue, which this Court has had to struggle with over the pendency of this motion.

The principle issue once again states whether or not Mr. Morgan will be placed at jeopardy again, double jeopardy, if the State is allowed to proceed on the five [D-41] remaining counts.

In discussing that I do not know what the reasoning of the jury was. I have just the documents that they provided to me, and from the charging document, the jury instructions, and the jury verdict forms which were taken by this Court.

It was, I believe, one set of participants in this trial that had the occasion to listen to the testimony in this trial, and I do not come to the same conclusions as the Defense as to what the issue, singular issue that the Defense has pled in this case.

Under those circumstances, motion to dismiss based upon double jeopardy is denied.